1978

Criminal Procedure: Expungement of Arrest Records

Minn. L. Rev. Editorial Board

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R.D.K. was arrested in 1974 after police found several bags of marijuana at his residence.[1] At a pretrial hearing, the state district court sustained a motion to suppress this evidence, and the prosecution moved for dismissal of the charge. In 1961, G.E.S., a minor, was arrested for felonious use of an automobile without permission of the owner.[2] He pled guilty and served sixteen months in a reformatory. His civil rights were restored upon his discharge,[3] and he had no subsequent criminal record. R.L.F. was stripping a car when apprehended by police in 1967.[4] He pled guilty to the misdemeanor of tampering with an automobile[5] and was sentenced to ninety days in the county workhouse.

Each of these three arrestees successfully moved, in state district court, for an order expunging[6] the records of his arrest.[7] On appeal by the state, the Supreme Court of Minnesota affirmed the expungement[8] for R.D.K. and G.E.S., but reversed with respect to R.L.F.,[9]

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1. *In re* R.L.F., 256 N.W.2d 803, 804 (Minn. 1977). R.D.K. was charged with felonious possession of a Schedule I controlled substance in violation of MINN. STAT. § 152.09(1), (2) (1976).

2. 256 N.W.2d at 806. G.E.S. was charged under MINN. STAT. § 168.49 (1961), *as amended,* MINN. STAT. §§ 609.55, .605(10) (1976).

3. Pursuant to MINN. STAT. § 242.31 (1976), a juvenile convicted of a felony or gross misdemeanor who is discharged before the expiration of the maximum term of commitment may be restored "to all civil rights." This includes a setting aside and nullification of conviction and a purging of all penalties and disabilities arising from such conviction.

4. *See* Brief for Appellant app., at A-3, *In re* R.L.F., 256 N.W.2d 803 (Minn. 1977) (State's brief in State v. R.L.F.) (Affidavit of R.L.F., Dec. 13, 1975).

5. *See* MINN. STAT. § 609.605 (10) (1976).

6. Expunge: "to destroy or obliterate; it implies not a legal act, but a physical annihilation. . . . To blot out; to efface designedly; to obliterate; to strike out wholly." BLACK'S LAW DICTIONARY 693 (4th rev. ed. 1968).

Courts and statutes use the term "expunge" loosely to refer to any of a variety of methods employed to cancel or revoke criminal records. It can mean actual destruction of the records, their surrender to the arrestee, obliteration of the arrestee's name upon the record, or sealing of the records in a confidential file. Regardless of the actual technique used, the desired effect of expungement is to remove the arrestee's record from current law enforcement files and from public scrutiny. *See, e.g.,* Grandison v. Warden, 423 F. Supp. 112 (D. Md. 1976); State v. Chambers, 533 P.2d 876 (Utah 1975).

7. In addition to ordering R.L.F.'s arrest record expunged, the district court also set aside his 1967 conviction. 256 N.W.2d at 807; *see* note 62 *infra.*

8. The noun "expungement" is not recognized by *Webster's Third International Dictionary.* The nominative form of the verb "expunge" is "expunction." However, since most courts have adopted the neologism, this Comment will conform to that usage.

9. *See* note 62 *infra.*

holding that without statutory authorization for the expungement "the court's inherent power is limited to instances where the petitioner's constitutional rights may be seriously infringed by retention of his records." *In re R.L.F.*, 256 N.W.2d 803, 808 (Minn. 1977).

Recent case law reveals a judicial ambivalence about the expungement of arrest records. This ambivalence results from two conflicting policy concerns: social order and individual rights.[10] Soaring crime rates demonstrate the need for potent law enforcement. Arrest records[11] are an effective means of criminal identification and therefore play an important role in the law enforcement effort.[12] Fingerprints and mugshots have obvious value in criminal identification, and retained arrest reports aid investigations by revealing geographic patterns, modi operandi, and other tendencies established by past behavior leading to arrest.[13] Computer technology and advanced methods of telecommunication have greatly increased the law enforcement value of arrest record retention.[14] Huge data files may now

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10. *See generally* Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, 23 U. KAN. L. REV. 1, 2 (1974):

> [T]he most difficult cases to decide have been those in which two competing values, each able to marshal respectable claims on its behalf, meet in a contest in which one must prevail over the other. The classical case is probably the recurring paradox of a government that prides itself both on being responsive to the public will and on its concern for individual liberty: the conflict between freedom and order. Unregulated freedom is anarchy, and absolute order is despotism. A free society seeks to achieve a compromise between these two extremes in which substantial amounts of individual liberty may subsist in a society in which public order is preserved.

See also Nizer, *The Right of Privacy: A Half Century's Development*, 39 MICH. L. REV. 526, 529 (1941).

11. In this Comment "arrest record" will refer not only to identification data, such as photographs and fingerprints taken at the time of arrest, but also to all written records made contemporaneously with the arrest, including the arrestee's name and address, the time and place of arrest, and the reason for the arrest. This information is considered a matter of public record. *See, e.g.*, MINN. STAT. § 15.162(2a), (5a) (1976). Subsequent investigative information constitutes a part of the final arrest record but is usually treated as confidential. *See, e.g., id.* § 15.162(2a). If the arrest results in conviction, the entire record becomes a "criminal record," although that portion of the file collected before the conviction may still be referred to as the record of arrest. *See* Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850, 852 n.11 (1971).

12. *See, e.g., Security and Privacy of Criminal Arrest Records: Hearings on H.R. 13315 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 173 (1972) [hereinafter cited as *Hearings on H.R. 13315*].

13. *See, e.g., id.* at 174 (" '[A]ll modern police agencies use their arrest records to analyze high crime areas and plan enforcement programs and patrol procedures.' ") (statement of Quinn Tamm, Executive Director, International Association of Chiefs of Police).

14. *See generally* INSTITUTE FOR DEFENSE ANALYSES, TASK FORCE REPORT: SCIENCE AND TECHNOLOGY (1967) (a report to The President's Commission on Law Enforcement

be effectively managed, and information moves instantaneously among local police forces, state crime bureaus, and the FBI.[15]

On the other hand, retention and widespread dissemination of arrest record information pose an increasing threat to the individual arrestee. Arrest is the first in a series of "status degradation ceremonies" in the criminal process.[16] Retention of arrest records perpetuates the degradation, and dissemination makes it inescapable. A record of arrest, whether the arrest results in conviction or not, may permanently stigmatize an individual.[17] Within the system of law enforcement and administration, the arrestee is more susceptible to future police harassment, rearrest, and unfavorable sentencing and parole decisions.[18] The most serious effects of arrest, however, occur in the community. The wide dissemination of arrest records outside law enforcement circles[19] adversely affects the arrestee's ability to

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and Administration of Justice) [hereinafter cited as SCIENCE AND TECHNOLOGY].

15. "The FBI Identification Division maintains criminal records for some 21.4 million individuals." Tarlton v. Saxbe, 407 F. Supp. 1083, 1084 (D.D.C. 1976). "During Fiscal 1970, the Identification Division processed 29,000 fingerprint cards daily, of which 13,000 were arrest submissions . . . from the approximately 8,000 contributing [federal, state, and local] agencies . . . ." Menard v. Saxbe, 498 F.2d 1017, 1022 (D.C. Cir. 1974). The Bureau's records may be "disseminated upon request to over 14,500 public and private agencies." Utz v. Cullinane, 520 F.2d 467, 471 (D.C. Cir. 1975).

16. *See generally* Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420 (1956); *see also* Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 590 (1960).

17. *Cf.* Karabian, *Record of Arrest: The Indelible Stain*, 3 PAC. L.J. 20, 36 (1972) (use of arrest records by employers).

18. *See, e.g.*, Davidson v. Dill, 180 Colo. 123, 127, 503 P.2d 157, 159 (1972).

19. *See generally Hearings on H.R. 13315*, *supra* note 12; *see also* Booth, *The Expungement Myth*, 38 L.A. B. BULL. 161, 163 (1963); Comment, *supra* note 11, at 853. Booth lists four original sources of arrest record dissemination in California: the FBI, the California Bureau of Criminal Identification and Investigation (equivalent to the Minnesota Bureau of Criminal Apprehension (BCA)), the local police force, and the court with jurisdiction over the case. Dissemination to non-law enforcement recipients takes place at each level.

Pursuant to 28 U.S.C. § 534 (1970), the Attorney General is empowered to collect arrest information and exchange it "with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions." The efficacy of this limitation is doubtful at best. The FBI is required to give arrest records to federally insured banking institutions, *see* 28 C.F.R. § 0.85(b) (1976), and at one time was also required to give such records to state employment and licensing bureaus. *See* Department of Justice Appropriation Act, 1973, Pub. L. No. 92-544, tit. II, 86 Stat. 1114 (1972).

Limits on dissemination by state and local sources are also minimal. Under the Minnesota Data Privacy Act, MINN. STAT. §§ 15.162-.169 (1976), data on individuals are categorized as public, private, or confidential. Recent legislation in Minnesota specifically made arrest information a matter of public record, although subsequent

secure employment[20] and is prejudicial to his social, economic, and psychological well-being.[21] For the convicted arrestee, this means that punishment does not end after the sentence is served.[22] For the exonerated arrestee, it means that society imposes a punishment though the law does not.[23] Since the number of arrests in the United States exceeds nine and one half million per year,[24] the magnitude of the

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investigative files are confidential. *See id.* § 15.162. State agencies have a duty to disseminate records to non-law enforcement recipients under certain statutes dealing with licensing. *See, e.g., id.* § 326.334(2). Since court calendars and files are open to the public, arrest information may leave the law enforcement sphere at this point, too. *See* Northwest Publications, Inc. v. Anderson, 259 N.W.2d 254 (Minn. 1977).

20. Studies have indicated that a majority of employers flatly refuse to hire an individual with an arrest record, whether or not the arrest ended in conviction. *See, e.g.*, Schwartz & Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROB. 133 (1962), *reprinted in* THE OTHER SIDE: PERSPECTIVES ON DEVIANCE 103, 110 (H. Becker ed. 1964). *See also* Morrow v. District of Columbia, 417 F.2d 728, 742-43 (D.C. Cir. 1969). In *Morrow*, Judge Skelly Wright discussed the "disastrous effect" that an arrest record may have on an individual's employability. 417 F.2d at 742 (citing REPORT OF THE COMMITTEE TO INVESTIGATE THE EFFECTS OF POLICE ARREST RECORDS ON UNEMPLOYMENT IN THE DISTRICT OF COLUMBIA (1967)[hereinafter cited as DUNCAN REPORT]).

Two of the respondents in *R.L.F.* were well aware of this effect. R.L.F. sought expungement because he wanted a job with a local police force and felt that his old arrest record would prevent him from being hired. *See* 256 N.W.2d at 807. G.E.S. sought expungement because he wished to join the armed services and a full criminal record check is standard procedure for new recruits. *See* Brief for Appellant app., at A-2, *In re* R.L.F., 256 N.W.2d 803 (Minn. 1977) (State's brief in State v. G.E.S.) (Affidavit of G.E.S., Feb. 10, 1976).

21. *See, e.g., Hearings on H.R. 13315, supra* note 12, at 31 (testimony of Charles T. Duncan); DUNCAN REPORT, *supra* note 20; Schwartz & Skolnick, *supra* note 20. *See generally* Haskel, *The Arrest Record and New York City Public Hiring: An Evaluation*, 9 COLUM. J.L. & SOC. PROB. 442 (1973); Schiavo, *Condemned by the Record*, 55 A.B.A.J. 540 (1969); Note, *Discrimination on the Basis of Arrest Records*, 56 CORNELL L. REV. 470 (1971); Note, *Removing the Stigma of Arrest: The Courts, The Legislature and Unconvicted Arrestees*, 47 WASH. L. REV. 659 (1972); Comment, *Criminal Records of Arrest and Conviction: Expungement from the General Public Access*, 3 CAL. W.L. REV. 121 (1967).

22. *See* Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U.L.Q. 147, 148.

23. *See, e.g.*, Note, *Criminal Procedure: Expunging the Arrest Records When There Is No Conviction*, 28 OKLA. L. REV. 377, 378 (1975) (footnotes omitted):

> Although cleared under the law, his record will not be cleared, and this charge may serve as a cloud on any future opportunities the individual might have. The practice of keeping arrest records creates a potential "record prison" for millions of Americans when past mistakes, omissions, and misunderstood activities become permanent evidence, capable of influencing the individual's life for decades.

24. *See* FEDERAL BUREAU OF INVESTIGATION, DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1976: UNIFORM CRIME REPORTS 170 (1977) ("In 1976, law enforcement agencies made an estimated 9.6 million arrests nationally for all criminal acts except traffic offenses. . . . In 1976, police arrests . . . decreased 5 percent from 1975."). *See also*

problem is considerable.[25]

The determination of whether arrest records should be expunged requires, therefore, a balancing of the law enforcement value of retaining a record against the detrimental effect that retention may have on the individual arrestee.[26] Weighing these concerns, courts have arrived at varying conclusions.[27] A substantial number have held that balancing is a legislative task and that expungement should be limited to cases provided for by statute.[28] Other courts have denied

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Hess & LePoole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CRIME & DELINQUENCY 494, 494 (1966) (By a " 'conservative' " estimate, " 'about 40 percent of the male children living in the United States today will be arrested for a non-traffic offense sometime in their lives.' ") (quoting THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 247 (1967)).

25. The problem is exacerbated by the increased range and scope of dissemination that computers have made possible. "Heretofore, the inherent inefficiencies of manual files containing millions of names have provided a built-in protection. Accessibility will be greatly enhanced by putting the files in a computer, so that the protection afforded by inefficiency will diminish, and special attention must be directed at protecting privacy." SCIENCE AND TECHNOLOGY, *supra* note 14, at 74.

26. *See generally* Comment, *supra* note 11. Some commentators have argued that, regardless of where the balance is ultimately struck, expungement is an inappropriate remedy for safeguarding individual rights. *See, e.g.*, Kogon & Loughery, *Sealing and Expungement of Criminal Records — The Big Lie*, 61 J. CRIM. L.C. & P.S. 378 (1970). Kogon and Loughery criticize expungement of records both in principle and in fact. They argue that, in principle, expungement is nothing more than a state sanctioned lie and, in fact, it does not work because records always leave some trace that makes the expunged information retrievable. *See id.* at 383. Thus, they conclude,

> The only way to breach the barriers standing in the way of an offender's reintegration into society is to assault them frontally. The remedy lies in a radically different approach — leaving the record alone while constantly striving to improve its quality, and mounting an educational program, with statutory supports, designed to liberalize public attitudes toward offenders.

Id. at 391.

27. *See generally* Annot., 46 A.L.R.3d 900 (1972).

28. *See, e.g.*, Herschel v. Dyra, 365 F.2d 17 (7th Cir.), *cert. denied*, 385 U.S. 973 (1966); Loder v. Municipal Court, 17 Cal. 3d 859, 553 P.2d 624, 132 Cal. Rptr. 464 (1976); Sterling v. City of Oakland, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962); Mulkey v. Purdy, 234 So. 2d 108 (Fla. 1970); Kolb v. O'Connor, 14 Ill. App. 2d 81, 142 N.E.2d 818 (1957); Statman v. Kelly, 47 Misc. 2d 294, 262 N.Y.S.2d 799 (Sup. Ct. 1965); State v. Bellar, 16 N.C. App. 339, 192 S.E.2d 86 (1972).

Many states have legislation enabling courts to act with regard to various aspects of the records of specified classes of individuals: youthful offenders, *see, e.g.*, CAL. WELF. & INST. CODE § 781 (West Supp. 1977); FLA. STAT. § 39.12(2) (1975); KAN. STAT. § 21-4616 (Supp. 1976); pardoned, first time offenders, *see, e.g.*, MINN. STAT. § 638.02 (1976); N.C. GEN. STAT. § 90-113.14 (1975); and exonerated arrestees, *see, e.g.*, ARIZ. REV. STAT. § 13-1761 (Supp. 1977); CONN. GEN. STAT. § 54-90 (1975); FLA. STAT. § 901.33 (1975); ILL. REV. STAT. ch. 38, § 206-5 (1973); IOWA CODE § 749.2 (1977); MICH. COMP. LAWS § 28.243 (1970); MINN. STAT. § 299C.11 (1976); MONT. REV. CODES ANN. § 80-2003 (Supp. 1965); NEV. REV. STAT. § 179.255 (1973); N.H. REV. STAT. ANN. § 593.4 (1955); PA. STAT. ANN. tit. 19, § 1405(c) (Purdon 1964); R.I. GEN. LAWS § 12-1-12 (Supp. 1976).

the existence of judicial power to order expungement, but have been willing to restrain dissemination of arrest information.[29] A third group has ordered expungement, but only in "extreme circumstances."[30] Finally, certain courts have claimed that the power to order expungement is entirely within their inherent equitable powers and that decisions to expunge may be based upon a purely judicial balancing of the equities in each case.[31]

In re R.L.F.[32] apparently aligns Minnesota with jurisdictions limiting the court's inherent expungement power to cases involving extreme circumstances.[33] The court did exhibit a willingness to broadly construe Minnesota's expungement statutes, but absent statutory authority, the Minnesota district courts may not order expungement except where necessary to remedy "a serious infringement" of constitutional rights. Thus, though *R.L.F.* arguably expands the power of the courts where there is some statutory basis for expungement, it places significant limitations on the inherent judicial powers. This Comment will examine the court's decision in order to trace and evaluate the parameters of these expungement guidelines.

R.D.K.'s arrest record was expunged pursuant to section 299C.11 of the Minnesota Statutes.[34] Section 299C.11 empowers the Minnesota Bureau of Criminal Apprehension (BCA)[35] to receive felony and gross misdemeanor arrest data from sheriffs and police chiefs across the state. It provides, however, that

> [u]pon the determination of all pending criminal actions or proceedings in favor of the arrested person, he shall, upon demand, have all such finger and thumb prints, photographs, and other iden-

29. This has been the position of the federal courts in the District of Columbia since the Duncan Report. *See, e.g.*, Utz v. Cullinane, 520 F.2d 467 (D.C. Cir. 1975); Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969); Tarlton v. Saxbe, 407 F. Supp. 1083 (D.D.C. 1976). *See generally* DUNCAN REPORT, *supra* note 20.

30. This is the position generally taken by the federal courts. *See, e.g.*, Urban v. Breier, 401 F. Supp. 706 (E.D. Wis. 1975); United States v. Dooley, 364 F. Supp. 75 (E.D. Pa. 1973).

31. *See, e.g.*, Bradford v. Mahan, 219 Kan. 450, 548 P.2d 1223 (1976); Diorio v. City of Utica, 85 Misc. 2d 374, 380 N.Y.S.2d 588 (Utica City Ct. 1976).

32. 256 N.W.2d 803 (Minn. 1977).

33. Although the court thus appears to reserve a modicum of discretion in expunging arrest records, as a practical matter the "extreme circumstances" that are the precondition for its exercise will rarely, if ever, be found to exist. *See* notes 89-94 *infra* and accompanying text.

34. 256 N.W.2d at 804-06.

35. The BCA is a statewide law enforcement agency established by chapter 299C of the Minnesota Statutes (1976). It acts as a repository and processing center for criminal records and investigatory data in cooperation with all local law enforcement bodies in the state. It also serves as a link in nationwide crime information systems. *See* MINN. STAT. § 299C.01(4) (1976). Its members may conduct investigations and make arrests with the same powers as a sheriff. *See id.* § 299C.03.

> tification data, and all copies and duplicates thereof, returned to him, provided it is not established that he has been convicted of any felony, either within or without the state, within the period of ten years immediately preceding such determination.[36]

In affirming the order to expunge R.D.K.'s arrest record, the Minnesota Supreme Court broadened the literal reach of section 299C.11 in three ways. First, the court construed "determination of all pending criminal proceedings in favor of the arrested person" to mean determination in any way except conviction.[37] The court reached this result by comparing section 299C.11 to section 152.18 of the Minnesota Statutes, which authorizes arrest record expungement for convicted drug offenders who complete an educational program. The legislative intent is explicit in section 152.18: rehabilitation warrants restoration of the first time offender to his prearrest status.[38] The *R.L.F.* court reasoned that if a convicted drug arrestee is eligible for expungement, a fortiori, a nonconvicted drug arrestee should also be eligible.[39]

The Minnesota court's analogy to rehabilitated drug offenders is not a particularly firm basis for an interpretation of section 299C.11.[40]

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36. *Id.* § 299C.11.

37. *See* 256 N.W.2d at 805. This construction may be inferred from the opinion since the court applied section 299C.11 to R.D.K., who was not convicted, but not to R.L.F., who was. It is odd, however, that the court did not cite City of St. Paul v. Froysland, 246 N.W.2d 435 (Minn. 1976), the only other decision that has construed section 299C.11. In that case, the court refused to extend section 299C.11 to an arrestee who pled guilty, but whose conviction was set aside after the successful completion of a probationary period. The *Froysland* court reasoned that the "assumption of a defendant's innocence, which would ordinarily be concluded from acquittal or dismissal of charges, does not result when, as in the case at bar, the guilt of a crime is admitted." *Id.* at 439.

38. MINN. STAT. § 152.18(2) (1976) provides,

> If the court determines, after hearing, that such person was discharged and the proceedings against him dismissed, it shall enter [an] order [of expungement]. The effect of the order shall be to restore the person, in the contemplation of the law, to the status he occupied before such arrest or indictment or information.

39. A New Jersey court applied similar reasoning in construing a similar provision. *See In re* Fortenbach, 119 N.J. Super. 124, 128, 290 A.2d 315, 317 (Super. Ct. Law Div. 1972) ("Clearly, then, since the statute authorizes, under certain conditions, the expungement of a conviction for 'lewdness,' *a fortiori* why not the arrest? Here the maxim *omne majus continet in se minus* . . . 'The greater contains the less,' seems appropriate.").

40. It is not at all clear that the policy reasons supporting expungement for a rehabilitated drug offender also support expungement for an arrestee who has not been convicted. The reasons for expungement of a nonconvicted arrestee's record seem to be related to the presumption of innocence and an assessment of potential usefulness of the record. *See* notes 10-26 *supra* and accompanying text. The reasons for expungement of the rehabilitated drug offender's record under MINN. STAT. § 152.18 (1976) are more related to extrinsic policies: encouraging rehabilitation and reform.

Moreover, a number of courts from other jurisdictions have specifically declined to engage in an expansive reading of similar statutes.[41] Nevertheless, the court's liberal construction of section 299C.11 is justified for reasons not mentioned in the opinion.

Section 299C.10 of the Minnesota Statutes requires local law enforcement agencies to collect arrest records for the use of the BCA. But section 299C.09, which describes the sort of identification records the Bureau is to *maintain,* speaks only of "information [concerning] . . . persons who have been or shall hereafter be convicted of a felony, gross misdemeanor, or an attempt to commit a felony or gross misdemeanor, within the state, or who are known to be habitual criminals."[42] Since section 299C.09 does not refer to unconvicted arrestees, it appears that there is no specific statutory authorization for the retention of arrest information collected under section 299C.10 unless the arrest results in conviction. Moreover, since the denigrating effect of an arrest record has become a matter of judicial notice,[43] a failure of the courts to protect arrestees not convicted of any crime from the burden of this stigma would seem to be inconsistent with the presumption of innocence.[44]

The second way in which the court expanded section 299C.11 in its affirmance of expungement for R.D.K. was by construing the provision for return of "finger and thumb prints, photographs, and other identification data" to include, by implication, the entire arrest record.[45] In 1976, the Minnesota Supreme Court had noted in *City of St. Paul v. Froysland*[46] "that Minn.St. 299C.11 is directed only to the return of identification data and not all records relating to arrest."[47] But the *R.L.F.* court neither mentioned *Froysland* nor articulated the rationale for expanding its interpretation of the statute. The court

41. Some courts have held, for example, that expungement is inappropriate when criminal proceedings terminate with any finding other than not guilty. *See* Richard S. v. City of New York, 32 N.Y.2d 592, 300 N.E.2d 426, 347 N.Y.S.2d 54 (1973); People v. Michael L., 80 Misc. 2d 292, 362 N.Y.S.2d 989 (Dist. Ct. 1975); People v. DeGaugh, 84 Misc. 2d 1, 374 N.Y.S.2d 253 (Rochester City Ct. 1975). Where the defendant is not acquitted, the continued law enforcement value of the arrest record arguably justifies its retention.

42. MINN. STAT. § 299C.09 (1976).

43. *See, e.g.,* Davidson v. Dill, 180 Colo. 123, 127, 503 P.2d 157, 159 (1972) (referring to aspects of an arrest record's detrimental effect as "common knowledge"). *See also* notes 16-25 *supra* and accompanying text.

44. *See* Hess & LePoole, *supra* note 24, at 502 ("While the United States claims it respects the right to presumption of innocence, it has not fully realized that the very essence of the presumption of innocence requires that it be applied in all cases where the person has not been adjudicated guilty."). *But see* Comment, *supra* note 11, at 857.

45. 256 N.W.2d at 805.

46. 246 N.W.2d 435 (Minn. 1976), *discussed at* note 80 *infra.*

47. *Id.* at 439 n.5.

simply stated, "We hold that such a statute implicitly includes the arrest records."[48]

Two factors justify this construction. First, reading section 299C.11 to reach the entire record best promotes the goal of fully restoring the arrestee's prearrest status that the court attributed to the statute.[49] Second, limiting the return to identification materials can at most protect the exonerated arrestee from public display of his photograph. As the court noted, information gathered at the time of arrest or incarceration is not protected by the Minnesota Data Privacy Act,[50] and nothing prevents public dissemination of the fact of arrest.[51] Including arrest records within the ambit of the statute seems necessary, therefore, to provide complete relief to an unconvicted arrestee.

The court's third expansion of section 299C.11 was the application of the statute to all law enforcement agencies that gather arrest information in the state and not just to the BCA.[52] Although section 299C.11 is located in the chapter of the Minnesota Statutes dealing with the Bureau of Criminal Apprehension, the court was justified in not limiting its application to that agency. Because records existing in local files can be just as damaging to the exonerated arrestee as

48. 256 N.W.2d at 805.

49. Drawing a parallel to MINN. STAT. § 152.18 (1976), the court attributed that statute's goal of restoring an arrestee to his prearrest status, *see* note 38 *supra*, to the terms of MINN. STAT. § 299C.11 (1976). *See* 256 N.W.2d at 805-06 ("we must conclude that Minn.St. 299C.11 clearly was intended to wipe his slate clean").

50. *See* 256 N.W.2d at 805; MINN. STAT. § 15.162(1a), (2a), (5a) (1976). The usual rationale for making arrest records available for public inspection is the prevention of secret arrest. *See* Morrow v. District of Columbia, 417 F.2d 728, 741-42 (D.C. Cir. 1969) (explaining a similar provision in the District of Columbia); *Proposed Amendments to sections 15.162-.163 of the Minnesota Statutes (Supp. 1975): Hearings on H.F. No. 2204 Before the Subcomm. on Probate and Real Estate of the House Comm. on Judiciary*, 69th Minn. Legis., 1976 Sess. (March 1, 1976) (tape recordings on file at Minnesota House of Representatives archives). Ironically, this availability of arrest records, intended to protect the arrestee, also works to his disadvantage in many situations. *See* notes 16-25 *supra* and accompanying text.

51. Obviously, written records of arrest may be just as damaging to the arrestee as photographs, since they contain his name, age, and address, the nature of the charge, and the place of arrest. *See generally* MINN. STAT. § 15.162(1a) (1976). All of this information would remain available to the public, despite the return of photographs. *See* OP. MINN. ATT'Y GEN. 852 (Aug. 2, 1976).

52. *See* 256 N.W.2d at 805. Several jurisdictions have interpreted statutes similar to MINN. STAT. § 299C.11 (1976) to apply only to state crime bureaus. In Kolb v. O'Connor, 14 Ill. App. 2d 81, 142 N.E.2d 818 (1957), and again in People v. Lewerenz, 421 Ill. App. 2d 410, 192 N.E.2d 401 (1963), for example, Illinois courts construed an analogous statute to empower courts to expunge records held by the state's Department of Public Safety, but not those held by municipal police. A Washington state court reached a similar result in the more recent case of State v. Adler, 16 Wash. App. 459, 558 P.2d 817 (1976).

those held by state agencies, such a limitation would clearly fall short of restoring the arrestee to his prearrest status.[53]

Expungement of the arrest record of G.E.S. was ordered pursuant to section 242.31 of the Minnesota Statutes,[54] which provides for restoration of civil rights to juvenile offenders. The terms of the statute do not explicitly empower a court to order expungement of arrest records, but the court read such authorization into a provision allowing an order to "purge and free [the defendant] from all penalties and disabilities arising from . . . conviction."[55]

Although some courts have arrived at different interpretations of similar statutes,[56] the Minnesota court's construction seems, in light of a complementary statutory provision[57] and basic policy considerations, to be justified. Section 638.02 of the Minnesota Statutes allows the board of pardons to grant a "pardon extraordinary" to certain qualified petitioners. When such a pardon has been granted, "the district court of the county in which the conviction occurred . . . [is to] order the conviction set aside and all records pertinent to the conviction sealed. . . . The term 'records' shall include but is not limited to all matters, files, documents and papers incident to the arrest . . . ."[58]

The policy underlying section 638.02 is manifest. Existence of an arrest record is a disability that can only be cured by expungement

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53. *See* note 49 *supra* and accompanying text.

54. *See* 256 N.W.2d at 806. MINN. STAT. § 242.31 (1976) provides,

> Whenever a person committed to the [Minnesota corrections] authority upon conviction of a crime is discharged from its control other than by expiration of the maximum term of commitment . . . or by termination of its control under the provisions . . . [allowing for release on the person's twenty-fifth birthday], such discharge shall, when so ordered by the authority, restore such person to all civil rights and shall have the effect of setting aside the conviction and nullifying the same and of purging such person thereof. . . .
>
> . . . .
>
> Such orders restore the defendant to his civil rights and purge and free him from all penalties and disabilities arising from such conviction and it shall not thereafter be used against him, except in a criminal prosecution for a subsequent offense if otherwise admissible therein.

55. *See* 256 N.W.2d at 806; MINN. STAT. § 242.31 (1976).

56. *See, e.g.*, United States v. McMains, 540 F.2d 387 (8th Cir. 1976) (construing 18 U.S.C.A. § 5021(b) (West Supp. 1977)) (provision for setting aside juvenile convictions under the Federal Youth Corrections Act does not authorize expungement of criminal records); note 61 *infra*.

57. *Compare* MINN. STAT. § 242.31 (1976), *quoted at* note 54 *supra*, *with id.* § 638.02(2) (1976) ("Such pardon extraordinary, when granted, shall have the effect of restoring such person to all civil rights, and shall have the effect of setting aside the conviction and nullifying the same and purging such person thereof . . . ."). *See also* note 71 *infra*.

58. MINN. STAT. § 638.02(3), (5) (1976).

or sealing. This legislative policy is significant because both sections 638.02 and 242.31 deal with restoration of civil rights to first offenders. The only difference between the two sections is that section 242.31 applies solely to youthful offenders, whereas section 638.02 may apply to offenders of any age. Since the youth of an offender has always been given special importance in questions of rehabilitation,[59] it would be incongruous to permit expungement of an adult pardonee's record but not that of a rehabilitated youthful offender. Both courts and commentators have consistently construed section 242.31 to have the "salutary purpose of removing the stigma which follows the conviction of a crime from the life of a young person who has been reformed and rehabilitated and is about to be returned to society."[60] Thus, the parallel language of sections 638.02 and 242.31, along with the basic policies underlying youth conservation, justifies the court's broad interpretation.[61]

The Minnesota Supreme Court reversed the district court order to expunge the arrest record of the third respondent, R.L.F.[62] R.L.F. had sought expungement on the theory that it was within the inherent, equitable powers of the court to balance the law enforcement value of arrest record retention against the potential damage to an arrestee.[63] He argued that if the state could not show a compelling reason for retention, the court should order expungement.[64] Refusing

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59. *See generally* Gough, *supra* note 22.

60. State v. Meyer, 228 Minn. 286, 299, 37 N.W.2d 3, 12 (1949). *See generally* Note, *Sentence and Release of Youthful Offenders*, 34 MINN. L. REV. 532, 532-33 (1950).

61. Not all courts would agree. *See, e.g.*, Fite v. Retail Credit Co., 386 F. Supp. 1045 (D. Mont. 1975) (there is no general policy against allowing full disclosure of juvenile arrest records to credit company); *In re* Raynor, 123 N.J. Super. 526, 303 A.2d 896 (Super. Ct. App. Div. 1973) (statutory provision for the expungement of record of conviction does not authorize expungement of arrest record despite the fact that language in a similar statute has been so construed).

62. *See* 256 N.W.2d at 807. The district court also set aside R.L.F.'s conviction, but this ruling was not appealed by the state, and the reversal by the supreme court presumably affected only the expungement order. There was apparently some doubt as to this fact, however, for the issue was raised by counsel for R.L.F. in a petition for rehearing. Respondent's Petition for Rehearing at 2-4, 7, *In re* R.L.F., 256 N.W.2d 803 (Minn. 1977). The petition was denied on August 30, 1977, without benefit of a clarifying opinion. *In re* R.L.F., 256 N.W.2d 803 (Minn. 1977).

Analytically, it is unlikely that the supreme court would have reversed the district court's order setting aside the conviction. R.L.F. had met the statutory requirement for having his conviction set aside. *See* MINN. STAT. § 609.166 (1976), *quoted at* text accompanying note 76 *infra*. Thus, the order of the district court was an exercise of discretion specifically granted by the legislature, which the supreme court could reverse only if it found that the discretion had been abused.

63. This approach has been employed by a number of courts. *See, e.g.*, Davidson v. Dill, 180 Colo. 123, 132-33, 503 P.2d 157, 162 (1972); Eddy v. Moore, 5 Wash. App. 334, 345, 487 P.2d 211, 217 (1972).

64. *See* 256 N.W.2d at 807.

to apply such a test,[65] the court disposed of R.L.F.'s case by making two summary findings. First, there was no statutory authority for the expungement of R.L.F.'s record.[66] Second, there was no "serious infringement" of R.L.F.'s constitutional rights arising from retention of his record and thus the court could not use its inherent powers[67] to order expungement.[68]

Standing alone, the court's conclusions with respect to R.L.F. would, perhaps, be unremarkable,[69] but their perfunctory nature and the formalism that underlies them stand in stark contrast to the broad statutory constructions and the general sensitivity to the demands of equity that characterized the court's treatment of R.D.K. and G.E.S.

The court's consideration of R.L.F.'s statutory grounds for expungement was limited to the blunt conclusion that "[i]n this case, as distinguished from the other two incorporated in this trilogy of appeals, we have no statutory authority to guide us in determining whether the court had the power to expunge the records."[70] It is true that, read narrowly, none of the provisions of the Minnesota Statutes dealing with arrest records provides R.L.F. with statutory grounds for

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65. Had the court applied a balancing test, it would have found a strong case for expungement. R.L.F.'s misdemeanor arrest record was ten years old. Subsequent to his release, his record was spotless. He settled down, began a family, and was steadily employed. Brief for Appellant app., at A-4, *In re* R.L.F., 256 N.W.2d 803 (Minn. 1977) (State's brief in State v. R.L.F.) (Affidavit of R.L.F., Dec. 13, 1975). Clearly, the law enforcement value of retaining his record was not great. Moreover, the court did not dispute the contention that R.L.F.'s record would hinder his efforts to secure employment with a suburban police force. *See* 256 N.W.2d at 807.

66. *See* 256 N.W.2d at 807.

67. The "inherent powers" of a court are those powers that it possesses as a natural consequence of being a court: the powers necessary for it to function as an independent judicial body and to do justice. *See, e.g.*, State v. Superior Court, 98 Ariz. 74, 77, 275 P.2d 887, 889 (1954):

> The "inherent powers" of a court are an unexpressed quantity and undefinable term, and the courts have indulged in more or less loose explanations concerning it. Undoubtedly, courts of justice possess powers which were not given by legislation and which no legislation can take away. There are "inherent powers" resident in all courts of superior jurisdiction. These powers spring not from legislation but from the nature and constitution of the tribunals themselves.

68. *See* 256 N.W.2d at 808. The court reasoned that an exercise of inherent power should not be favored where the legislature has formulated statutory guidelines. As a result, expungement of arrest records was generally limited to cases falling within a statutory provision, with the courts' "inherent power" to order expungement reserved for those extreme cases where retention of the record would result in serious infringement of the arrestee's constitutional rights. *See id.*; text accompanying notes 88-90 *infra*.

69. *See* notes 28 & 30 *supra* and accompanying text.

70. 256 N.W.2d at 807.

expungement.[71] The court's reading of the statutes governing the expungements of R.D.K. and G.E.S., however, was anything but narrow.[72] If the same expansive approach to statutory construction had been used in the case of R.L.F., the court probably would have reached a different conclusion.

R.D.K.'s arrest record was expunged under section 299C.11 of the Minnesota Statutes. Read literally, this statute would not apply to R.L.F. for two reasons. First, section 299C.11 applies only to persons arrested for gross misdemeanors and felonies.[73] R.L.F. was arrested for a simple misdemeanor. Second, section 299C.11 provides for return of arrest records "[u]pon the determination of all pending criminal actions or proceedings *in favor of* the arrested person."[74] R.L.F. was convicted. Neither of these differences, however, raises an insurmountable barrier to expungement.

If R.L.F.'s conviction was the principal reason for not applying 299C.11, the court's failure to consider the fact that his conviction had been set aside pursuant to section 609.166 of the Minnesota Statutes[75] is inexplicable. Under that statute,

> [a]ny person who is convicted of or pleads guilty to a felony, gross misdemeanor or misdemeanor may move the convicting court for the entry of an order setting aside the conviction where:
>
> (a) the offense was committed before he was 21 years of age;
>
> (b) five years have lapsed since the person has served the sentence imposed upon him or has been discharged from probation,

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71. R.L.F. apparently had an alternative to judicial expungement of his arrest records. Under MINN. STAT. § 638.02 (1976), he could have petitioned the state board of pardons for a "pardon extraordinary." *See* notes 57-58 *supra* and accompanying text. A grant of a "pardon extraordinary" would have entailed a sealing of his records and restriction of their use to future judicial proceedings. However, since expungement under section 638.02 is administered by the board of pardons and not by the court, this section, though applicable to R.L.F., does not support a judicial expungement power. *See generally* Gough, *supra* note 22, at 166 (discussion of administrative versus judicial expungement).

72. *See* text accompanying notes 34-61 *supra*.

73. One of the reasons section 299C.11, when read literally, is inapplicable to misdemeanants is that it applies only to the BCA. Since the BCA collects only records of gross misdemeanor and felony arrests, *see* MINN. STAT. § 299C.11 (1976), a statute allowing misdemeanor arrestees to retrieve their records from the BCA would be of no value. In its treatment of R.D.K., however, the *R.L.F.* court extended the scope of section 299C.11 to cover "all entities which gather [arrest] information for the BCA." 256 N.W.2d at 805. *See* text accompanying notes 52-53 *supra*. Because of this broad construction, section 299C.11 may now provide any misdemeanor arrestee with a statutory basis for requesting the expungement of records held by county and municipal police.

74. MINN. STAT. § 299C.11 (1976) (emphasis added).

75. *See* Brief for Respondent R.L.F. at 5, *In re* R.L.F., 256 N.W.2d 803 (Minn. 1977).

> and during the five year period the person has not been convicted of a felony or gross misdemeanor; and
>
> (c) the offense is not one for which a sentence of life imprisonment may be imposed.[76]

R.L.F. met the requirements set by the legislature in section 609.166. Obviously, he also convinced the district court judge to exercise his statutorily authorized discretion to set aside the conviction.[77] Therefore, by both legislative and judicial determination, R.L.F.'s conviction was no longer necessary to the state's criminal justice system, and he was "deemed not to have been previously convicted."[78]

Unless this legislative mandate is nugatory, R.L.F. cannot be distinguished from R.D.K. on the basis of his conviction. To do so would give legal effect to a conviction that the legislature has commanded should be meaningless. Thus, the only basis for distinguishing R.L.F. from R.D.K. was the fact that R.L.F. was convicted of a misdemeanor. As the court itself noted in *City of St. Paul v. Froysland*,[79] however, it makes little sense to deny the benefits of section 299C.11 to an otherwise eligible arrestee simply because his crime is less serious.[80] In short, there was no principled way to distin-

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76. MINN. STAT. § 609.166 (1976).

77. *See id.* § 609.167(3).

78. *Id.* § 609.168 (effect of court order setting aside a conviction).

79. 246 N.W.2d 435 (Minn. 1976).

80. "[Section 299C.11] only applies by its express terms to felonies and gross misdemeanors. However, as the trial court ruled, logic seems to dictate that the apparent legislative policies underlying the statute extend to less serious crimes and criminals, i.e., misdemeanors." *Id.* at 439 n.5.

Froysland involved a woman who was arrested for disorderly conduct, a misdemeanor. She pled guilty, but the judge stayed imposition of sentence for six months, pursuant to MINN. STAT. § 609.135 (1976). After the defendant successfully completed the six month stay, her conviction was vacated and charges were dismissed. She petitioned the court for return of all identification data and expungement of her arrest record pursuant to section 299C.11. The municipal court refused her request, and the supreme court affirmed, holding "that a dismissal of charges following a stay of imposition of sentence is not a determination in favor of the accused within the meaning of Minn.St. 299C.11." 246 N.W.2d at 439.

Since *Froysland* appears, at least facially, to be strong precedent for the result in *R.L.F.*, the court's failure to cite it is mystifying. *See also* text accompanying notes 46-48 *supra*. The *Froysland* decision, however, is distinguishable from R.L.F.'s case on two important grounds. First, although section 609.135 empowers the court to "discharge" the arrestee after successful completion of stay, it does not specifically call for setting aside his conviction. In contrast, section 609.168 contains a clear mandate that the arrestee shall be "deemed not to have been previously convicted." Second, the requirements for vacating a conviction under section 609.166, *quoted at* text accompanying note 76 *supra*, constitute a legislative determination of factors the conjunction of which would tend to negate the need for maintaining a record of a conviction. These same factors would seem also to negate the need for keeping an arrest record.

guish R.L.F. from R.D.K., and expungement under section 299C.11 was as appropriate for one as it was for the other.

But the court need not have gone that far. The reasoning employed to justify expungement of G.E.S.'s arrest record under section 242.31 applies with identical force to section 609.168, making that section itself an appropriate statutory basis for expunging R.L.F.'s record. The court found statutory authority to expunge G.E.S.'s record in the language of section 242.31, which provides that orders issued under that section " 'purge and free [the defendant] from all penalties and disabilities arising from such conviction and it shall not thereafter be used against him.' "[81] Since arrest records are clearly not "penalties and disabilities arising from [a] *conviction*," the statute, read literally, cannot be said to authorize expungement of those records. Yet the court found in that language, without more, a "clear" legislative intent to allow such expungement.[82]

With considerably less pomp but equal force, section 609.168 provides that where an order setting aside a conviction is issued pursuant to sections 609.166 to 609.167, "the person shall be deemed not to have been previously convicted."[83] Deeming a person not to have been previously convicted is simply one way of purging him of "all penalties and disabilities arising from the conviction." Moreover, like section 242.31, section 609.168 is one of the statutes "in [the] field dealing with youthful offenders."[84] As such, it shares with section 242.31 a common purpose: "to minimize or eliminate any adverse consequences when there is only one conviction on an otherwise clean record."[85] Since the literal reach and policy basis of 242.31 and 609.168 are identical, it seems inconsistent to give them different meanings with respect to arrest records. Not surprisingly, this inconsistency yields an inequitable result: G.E.S., a juvenile felon, has his record expunged; R.L.F., a juvenile misdemeanant, does not.

Even if the possible statutory bases for expungement were not readily apparent to the court, the relative inequity of the result should have been. It is the inevitability of such inequities that is the principal weakness of a rigid requirement that expungement have a statutory basis. As the case itself demonstrates, the court's apparent conviction that the Minnesota statutory scheme is sufficiently exten-

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There are no such requirements in section 609.135. Thus, since such different policies applied to the case of R.L.F., a strict construction modeled after *Froysland* was not warranted.

81. 256 N.W.2d at 806.
82. *See id.*
83. MINN. STAT. § 609.168 (1976).
84. 256 N.W.2d at 806.
85. *Id.*

sive to preclude the need for judicial intervention to fill in the gaps[86] is questionable. To bring R.D.K. and G.E.S. within the statutory scheme required considerable imagination and a willingness to read the statutes broadly. That willingness is not, however, as the court's treatment of R.L.F. demonstrates, without limits. Inevitably, there will be individuals who are indistinguishable, in terms of the equities of their cases, from those protected, but who are nevertheless victimized by discontinuities in the statutory scheme. By denying the existence of a judicial power to bridge those discontinuities directly, the court in effect denies one of the principal purposes of its equitable powers: to fill "the gaps and interstices in the law where the law through neglect or oversight fails to protect individuals against hardship and injury."[87]

Be that as it may, under the court's ruling in *R.L.F.*, the inherent power of Minnesota courts "is limited to instances where the petitioner's constitutional rights may be seriously infringed by retention of his records."[88] Applying this test to R.L.F., the court rejected the argument that the state's retention of R.L.F.'s arrest records violated his constitutional right of privacy and that expungement was therefore required unless the state could show a compelling interest in retaining the records.[89] Placing the burden of proof on R.L.F., the court summarily concluded that no "serious infringement" would result if the records were not expunged.[90] The court did not discuss the details of its "serious infringement" test; it simply concluded that R.L.F. failed to pass it.

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86. *See id.* at 807. This is the necessary implication of the court's refusal to follow decisions from states where courts have the inherent power to order expungement because of a lack of statutory provisions. The court cited approvingly Loder v. Municipal Court, 17 Cal. 3d 859, 553 P.2d 624, 132 Cal. Rptr. 464 (1976), where the "California Supreme Court held that expungement would not be granted where the state legislature had provided an extensive body of legislation controlling the question." 256 N.W.2d at 807.

87. Mulkey v. Purdy, 234 So. 2d 108, 112 (Fla. 1970) (Ervin, C.J., dissenting).

88. 256 N.W.2d at 808.

89. *See* Brief for Respondent R.L.F. at 8-11, *In re* R.L.F., 256 N.W.2d 803 (Minn. 1977). *See generally* Davidson v. Dill, 180 Colo. 123, 130, 503 P.2d 157, 161 (1972); Doe v. Commander, 273 Md. 262, 272, 329 A.2d 35, 41 (1974); Eddy v. Moore, 5 Wash. App. 334, 337, 487 P.2d 211, 213 (1971). In each of these cases, the court balanced the law enforcement value of retaining the arrest record against the damage that its existence might do to the arrestee. In *Eddy*, the Washington Court of Appeals cited Griswold v. Connecticut, 381 U.S. 479 (1965), to support its contention that

> [w]e have now reached the point where our experience with the requirements of a free society demands the existence of a right of privacy in the fingerprints and photographs of an accused who has been acquitted, to be at least placed in the balance, against the claim of the state for a need for their retention.

5 Wash. App. at 345, 487 P.2d at 217.

90. *See* 256 N.W.2d at 808.

To the extent that R.L.F.'s argument was based on a federal constitutional right of privacy the Minnesota Supreme Court was probably correct in rejecting it, for the argument was seriously undermined by the recent decision of the United States Supreme Court in *Paul v. Davis.*[91] In that case, Davis was arrested for shoplifting. He was fingerprinted and photographed by police. Before he was tried, however, police distributed a listing of "active shoplifters" to local merchants. The list included the arrestee's name and "mugshot," despite the fact that he had never been convicted. The Court, in an opinion by Justice Rehnquist, held that Davis may have had a cause of action for defamation against the local police, but the misuse of his arrest records violated neither his right of privacy nor due process of law.[92] If the constitutional right of privacy does not protect against illegal dissemination of the arrest record of a nonconvicted arrestee, it seems clear that it would not bar mere retention of the records of a convicted arrestee.[93]

In light of *Paul v. Davis,* it is difficult to conceive of any substantial constitutional argument that a convicted arrestee like R.L.F. could offer to satisfy the Minnesota court's "serious infringement" test. *R.L.F.* thus leaves Minnesota with a broadened statutory scheme for expungement of arrest records, but it narrows the inherent power of expungement to a point where, practically, it ceases to exist. Expansion of the former does not fill the void left by restriction of the latter, and the net result is a substantial loss of judicial flexibility.

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91. 424 U.S. 693 (1976). Another possible reason for rejecting the privacy argument is that the cases cited in support of that argument, *see* note 89 *supra,* differ from R.L.F.'s case insofar as they dealt with arrestees who had not been convicted. The court may have implicitly ruled in *R.L.F.* that, in any balancing of public good versus individual privacy, the fact of conviction will always tip the scale for retention of records. In fact, it appears that no court has ever expunged a convicted arrestee's criminal file on the argument that its retention would infringe his right of privacy. *See* Alderman v. Shiawassee County Sheriff, 66 Mich. App. 649, 653, 239 N.W.2d 696, 698 (1976) ("Plaintiffs have not shown us any case, nor has our independent research disclosed any case, in which an individual, after conviction, had a claim based upon privacy to return of arrest records."). However, the fact of conviction in the case of R.L.F. is a singularly unconvincing rationale for disallowing expungement. *See* notes 75-78 *supra* and accompanying text.

92. The Supreme Court stated that the right of privacy, as formulated in Griswold v. Connecticut, 381 U.S. 479 (1965), and Roe v. Wade, 410 U.S. 479 (1973), was limited in scope to analogous situations: "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." 424 U.S. at 713. The Court also found that since Davis had alleged no actual economic harm, but only damage to his reputation, there was no deprivation of life, liberty, or property without due process of law. *See id.* at 712.

93. *See* Hammons v. Scott, 423 F. Supp. 618 (N.D. Cal. 1976) (citing Paul v. Davis, 424 U.S. 693 (1976)) (nonconvicted arrestee denied expungement of arrest record on state constitutional grounds).

The immediate effect of this loss is apparent in the court's treatment of R.L.F., an arrestee whose case seemed eminently suited to expungement,[94] but who was denied relief because the court found no statutory basis for his claim. By narrowing the scope of the courts' inherent power and limiting the availability of expungement to cases within the provisions of the Minnesota Statutes, the court arrived at a result that is harsh and inequitable.

In the future, the problems posed by the *R.L.F.* decision could be resolved in two ways. First, Minnesota courts could accommodate petitioning arrestees who lack an explicit statutory basis for expungement by giving a broad reading to the "serious infringement of constitutional rights" test under the aegis of a right of privacy protected by the state constitution.[95] Adoption of a broad right of privacy would permit the courts to weigh the law enforcement value of retaining records against the detrimental effect on the arrestee. This would amount to the same judicial balancing that takes place under an "inherent" powers rationale.[96] The court would simply be doing it in a constitutional mode, as required by the holding in *R.L.F.*[97]

The second remedy for the problems apparent in *R.L.F.* is a balancing of interests, not in the courts, but in the legislature. This approach would respond directly to the implication in *R.L.F.* that, in the future, the legislature must determine state policy concerning arrest record expungement.[98] Should the legislature choose to rethink

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94. *See* note 65 *supra*.

95. Although the majority opinion in *Paul v. Davis* seemed to foreclose an expansive view of the right of privacy as a federal constitutional guarantee, *see* notes 91-93 *supra* and accompanying text, Justice Brennan pointed out in dissent that a state forum could still adhere to broader protection of the right of privacy under its state constitution. *See* 424 U.S. at 735 n.18.

The Minnesota Constitution does not explicitly guarantee a right of privacy, nor has the Minnesota Supreme Court ever construed the state constitution to include such a right. In the past, however, the court has employed a "penumbral" reading of article I of the Minnesota Constitution, *see* Thiede v. Town of Scandia Valley, 217 Minn. 218, 225, 14 N.W.2d 400, 405 (1944), similar to the type of reading by which the United States Supreme Court recognized the federal right of privacy, *see* Griswold v. Connecticut, 381 U.S. 479 (1965).

96. *See* note 89 *supra* and accompanying text.

97. The state right of privacy argument has been rejected in several cases from other jurisdictions. One of these cases, Loder v. Municipal Court, 17 Cal. 3d 859, 553 P.2d 624, 132 Cal. Rptr. 464 (1976), was cited by the *R.L.F.* court. 256 N.W.2d at 807. This suggests that, when the issue arises, the Minnesota Supreme Court will not recognize a right of privacy arising out of the state constitution.

98. Implicit in the Minnesota court's resolution of *R.L.F.* was an unwillingness to determine the contours of expungement availability and a desire to rely upon statutory guidelines. The court offered no explanation in constitutional or in jurisprudential terms for shifting the focus of discretion from the judiciary to the legislature. Discussion of the theory of inherent powers in other cases, however, indicates that the court's reasoning may have its basis in the concept of coequal branches of government. *See*,

its expungement guidelines, it might look to recent developments in California.[99] The focus of efforts in California has been on control of dissemination and prevention of prejudicial use of arrest records.[100] To assure that records are accurate and complete, California statutes now provide that all records of arrest must include a disposition statement.[101] An arrest that does not result in conviction is a "detention,"[102] a term that arguably has less potential for stigmatization than "arrest." Moreover, to limit dissemination to law enforcement agencies, the legislature has provided both civil and criminal penalties for unauthorized dissemination.[103] Finally, to avoid discrimination against arrestees, California has enacted statutory prohibitions against denial of employment, licensing, and personal advance-

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e.g., Mulkey v. Purdy, 234 So. 2d 108, 111 (Fla. 1970) (Ervin, C.J., dissenting). Recognition of this theory was intimated by the Minnesota Supreme Court in City of St. Paul v. Froysland, 246 N.W.2d 435 (Minn. 1976), where it upheld a lower court's denial of expungement for an arrestee who lacked a statutory basis for the relief sought: " 'It may or may not be sound social policy to extend the . . . protection [of expungement] to persons in the class of this defendant. However, in the absence of a Constitutional or statutory mandate, the courts ought not intrude into the record-keeping functions of the executive branch.' " *Id.* at 437 (quoting memorandum of the municipal court). *See also* United States v. Bohr, 406 F. Supp. 1218 (E.D. Wis. 1976); *In re* Grand Jury, 244 N.W.2d 253, 257 (Minn. 1976).

99. *See generally* Loder v. Municipal Court, 17 Cal. 3d 859, 553 P.2d 624, 132 Cal. Rptr. 464 (1976) (outlining the various provisions involving arrest records in California, and using their extensiveness as a rationale for disallowing court-ordered expungement).

One commentator has suggested that another approach to legislative reform would be codification of a "usefulness" criterion, arguing that, since the only rational basis for retention of an arrest record is its value to the criminal justice system, retention should be permitted only when it is demonstrably useful to that system. *See* Comment, *supra* note 11, at 854-55.

100. California has no specific statutory authority for expungement, but there are some provisions for "sealing" certain records. *See, e.g.*, CAL. PENAL CODE § 851.7 (West Supp. 1977) (exonerated juvenile misdemeanants); *id.* § 851.8 (specified adult misdemeanants); *id.* § 1203.45 (convicted juvenile misdemeanants who have served sentence); CAL. WELF. & INST. CODE § 781 (West Supp. 1977) (specified juveniles).

101. *See* CAL. PENAL CODE §§ 11115-11117 (West Supp. 1977). *See also id.* §§ 11120-11127 (examination and correction of records by arrestee).

102. *See id.* § 849.5.

103. *See* CAL. LAB. CODE § 432.7(b) (West Supp. 1977) (civil penalty provided against employers who use arrest records to discriminate in hiring); CAL. PENAL CODE § 11076 (West Supp. 1977) (records shall be disseminated only to authorized agencies); *id.* § 11105(b)-(c) (listing of authorized agencies); *id.* §§ 11140-11144 (describing unlawful dissemination and prescribing criminal penalties).

Ordinary defamation and invasion of privacy actions may also be available to those whose records have been wrongfully disseminated. *See* Paul v. Davis, 424 U.S. 693, 711-12 (1976). *But cf.* Karst, *"The Files": Legal Controls over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROB. 342, 346-47 (1966) (general limitations of civil suits as a means of controlling access and dissemination of files).

ment based solely on a history of arrest.[104]

In comparison to Minnesota's legislation, which focuses only on expungement, the California statutory scheme is superior for at least three reasons. First, the prevention of widespread dissemination of arrest record information protects all California arrestees.[105] In Minnesota, only those eligible for expungement are protected, and those who are ineligible, such as R.L.F., are afforded no relief at all. Second, the California system allows retention of arrest records only for strictly defined, legitimate law enforcement purposes.[106] This limits the detrimental effects that arrest record retention may have on an individual and, at the same time, accommodates any realistic law enforcement argument for retention. Third, under the California system, the burden of assuring that an arrest record is not put to an illegitimate use is on the criminal justice system.[107] In Minnesota, that burden is on the individual arrestee. If he is to have his record expunged, he must come forward and petition the court. Thus, a person in a position to secure private counsel is more likely to receive the benefits of expungement than is a person who is unable to afford counsel.[108]

Relegating the task of balancing the interests of social order and individual rights to the legislature may be justifiable on several grounds. The ability of a legislature to undertake extensive and intensive empirical evaluations of relevant considerations may make it

104. CAL. BUS. & PROF. CODE § 461 (West Supp. 1977) (public licensing); CAL. LAB. CODE § 432.7 (West Supp. 1977) (public and private employment). Although R.L.F. would have benefited from the California provisions limiting dissemination, the statutes preventing employers from using arrest records would not have protected him. The California statute provides, "Persons seeking employment as peace officers or for positions in law enforcement agencies with access to criminal offender record information or for positions with the Division of Law Enforcement of the Department of Justice are not covered by this section." *Id.*

105. *But see, e.g.*, Alexander & Walz, *Arrest Record Expungement in California: The Polishing of Sterling*, 9 U. S.F. L. REV. 299, 313 (1974). The authors criticize the attempt to control dissemination as being impracticable because there are too many disseminators. The fact that there are many disseminators, however, does not make a clear case for allowing uncontrolled dissemination.

106. *See* CAL. PENAL CODE § 11105(b) (West Supp. 1977) (describing the limited field of agencies to which the Attorney General is obliged to disseminate records and the purposes to which they may be put); *id.* § 11105(c) (describing the agencies to which the Attorney General may disseminate records upon a showing of a compelling need).

107. *See id.* § 11077 (making the Attorney General responsible for protecting criminal records, preventing their illegitimate dissemination and use, and instituting training programs to teach security methods to those handling the records).

108. Arguably, those persons who cannot afford counsel may also be the ones with the greatest need for the expungement remedy. *See* note 20 *supra*.

better suited to balancing such considerations.[109] Moreover, this sort of balancing may better reflect the public interest when done by a representative body. Finally, legislation provides determinate guidelines, whereas judicial discretion produces only individual, ad hoc determinations.[110] The Supreme Court of Minnesota may have been cognizant of these concerns, but it articulated none of them. What is distressing, therefore, about this apparent relegation of an important judicial function to the legislature is the same thing that makes the inconsistencies in the court's treatment of R.L.F. so hard to accept. The problem is not so much that the conclusions were wrong as that their justifications were so perfunctory and unenlightening.

109. *See* Sterling v. City of Oakland, 208 Cal. App. 2d 1, 5, 24 Cal. Rptr. 696, 699 (1962).

110. *See, e.g.*, Statman v. Kelly, 47 Misc. 2d 294, 298, 262 N.Y.S.2d 799, 803 (Sup. Ct. 1965) (holding that expungement should not be granted where no statutory authority existed because arrogation of legislative authority by the court would result in compounded complications in individual instances).